United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7537 B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

YTZHAK HABEL,

Plaintiff-Appellee,

—against—

HARRY DIAMOND,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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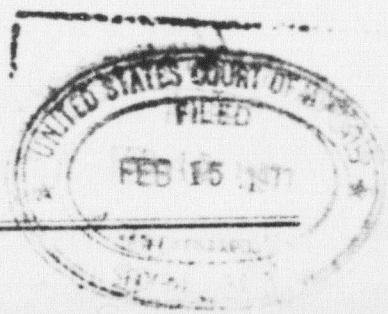

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Statement of Facts

This lawsuit arose out of a vehicular accident. On December 24, 1974, a clear day, the plaintiff was walking on the sidewalk* (72a, 73a) when struck by the automobile of the defendant which had gone up on the sidewalk (18a, 19a). The defendant in the trial below conceded contact between the automobile and "a pedestrian" (10a), but not liability.

A jury verdict was rendered in favor of the plaintiff for $75,000.00 (160a). An application to the Trial Court to set the verdict aside was denied, the presiding Judge

* Page references are to the Joint Appendix.

stating, "The Court believes the injuries justify the award of the jury" (161-2a). The defendant's Notice of Appeal limited the issue on this appeal solely to excessiveness of that verdict (164a).

The plaintiff-appellee at the time of the accident was an Israeli national (72a), 21 years of age (97a) who had come to the United States as a tourist after completing three years in the Israeli army, prior to which he was a student (72a). Physically, he felt fine just prior to the accident (72a). Suffering a head injury, diagnosed as cerebral concussion with amnesia for the events of the accident itself (113a, 140-1a), the plaintiff-appellee, Mr. Harel, did not recall the impact and his first recollection thereafter was in the ambulance on his way to Fordham Hospital. At the time he was in the ambulance, Mr. Harel felt pain in his head, back, left chest, left ankle and over different parts of his body (73a). He was confined to Fordham Hospital from December 24, 1974 until January 8, 1975 (74a) where he first was fed through intravenous tubes, with tubes also inserted into his nose and penis (75a). Understandably, he was anxious in addition to the pain (75a). He was transferred by ambulance to Trafalgar Hospital where he remained from January 8 to January 14, 1975 under more comfortable conditions (76a).

Even after discharge from the hospitals, he continued to experience dizziness and anxiety (78a) and suffered back pain, headaches and was "jumpy and excitable" (80a). His return to Israel was delayed from January 25, 1975 to April 24, 1975 in order to continue with private medical care in the U.S.A. (81a). His disability was estimated at four months initial total disability, with 50 per cent partial disability extending to October 1, 1975 (131-2a).

Although the headaches disappeared by the following summer, he continued to experience daily back pain when awaking, the severity of which was affected by the weather and his activities (81-2a). Having found employment as an aircraft mechanic upon his return to Israel, this work required bending and lifting heavy objects. This caused him pain in his back, which he described as, "sometimes I must stop and rest till the cramp or pain is less so I can work again . . . When the weather is bad, the pains are especially bad . . . I have had to push myself to keep up with the others. I feel pain many times on the job, but try not to let it show if I can help myself" (82-3a). Mr. Harel stopped sports activities he previously had enjoyed, such as soccer, volley ball and bowling. Required to do reserve military service as an armored car driver, he found his military duties an additional cause of back pain (82-3a). He expressed fear that his back injury could lose him his job (83a) and mentioned this problem to his doctor (119a).

At Fordham Hospital, he was placed under neurological watch for head injury and x-rays were reported to reveal a cortical fracture of the left sixth rib and fractures of the transverse process of the third and fourth lumbar vertebrae (100a). The record also noted an abrasion over the left flank and swelling of the left foot (98-9a). Although he complained of pain to the thoracic spinal region, which is the upper back (104a, 106a, 114a), there was no diagnosis or exclusion of injury to this region in the Fordham Hospital Record (91-110a). At Trafalgar Hospital, a corset-type back support was ordered (140) which he wore for a 3-month period (76a, 119a).

After his return to Israel, Mr. Harel consulted Dr. Horoszowski, an orthopedic surgeon (115-6a) for his complaints. The doctor noted continuing complaints involving the left foot and left chest which were not disabling, in contrast to the positive and objectively confirmed findings involving Mr. Harel's back (119-22a). Additional x-rays, taken by a radiologist at the request of this orthopedist confirmed the previously diagnosed lumbar fractures and also disclosed wedging compression fractures of two thoracic vertebrae (123-5a). The prognosis, as described by this doctor, is that of a permanent, incurable condition which shall continue to require symptomatic relief (132-3a), for which Mr. Harel is advised to restrict his activities and reduce weight so as to avoid stress on his spinal column. Significantly, the doctor recommended that "occupationally, he should change his occupation, if possible, and find a type of work which avoids stress from standing and bending, as well as one which would not require lifting of heavy objects" (130a, 141a). Because of his multiple spinal injuries, he has a greater likelihood of arthritic complications in the damaged vertebrae as he ages (132-3a). Dr. Horoszowski's dire prognosis was substantially confirmed by another of the treating doctors, Dr. Murray Budabin (128-9a, 141a).

In sum, in addition to the initial period of hospitalization and total disability, together with injuries from head to foot, the effect of which largely subsided within one year, Mr. Harel was left by the accident with four permanently damaged spinal vertebrae which have changed his way of life and for which it is advisable that he change his occupation to one more sedentary in nature. Despite these measures, progressive deterioration and continuing pain are to

be anticipated for the balance of his life expectancy. On the basis of statistical tables (156a), this is estimated at 47.8 years.

Issues Presented

A. Was the judgment awarded Ytzhak Harel excessive?

B. Was the issue of diminution of plaintiff's earning capacity by reason of his injuries as charged by the Trial Court, a proper element of damage in this case?

POINT I

The charge of the Trial Court as to diminution of earning capacity as an element of damage was proper in the light of the evidence in the record.

Having no doubt encountered that line of cases which holds that a verdict is conclusive as to the amount of damages in the absence of error by the Trial Court, appellant cites one alleged error. Confusing, whether intentionally or inadvertently, the matter of loss of earnings with diminution of earning capacity, appellant's Brief states, at page 13:

> "Loss of earnings was neither pleaded nor proved in this case. There was not one scintilla of evidence produced at trial to the effect that the plaintiff lost one day's pay because of this accident. The Court acknowledged that the plaintiff was not employed at the time of the accident."

Appellant then concludes that the Trial Court's charge on the subject of diminution of earning capacity was improper.

The charge in this respect appears more fully in the transcript at pp. 342-4. Comparison with the recognized authoritative source of instructions in court actions in New York State will show that the charge was adapted from 1 Pattern Jury Instructions 2:290, at pp. 641-2. Further comparison clearly shows that the portion of the charge referring to loss of earnings was deliberately omitted by the Trial Court below which charged only as to diminution of earning capacity.

It is true, as appellant contends, that the plaintiff-appellee was not employed at the time of the accident and that the record is barren of any indication that he had been gainfully employed prior to the accident. So what! It clearly is the law in New York "that a person tortiously injured is entitled to recover for impairment of future earning capacity, without limitation to the actual earnings which preceded the accident. . . . In the cases of injuries, involving very young people whose vocational potentialities have not yet been developed, the Courts have allowed assessment of damages based on future, and not presently realized, earning capacity."

Grayson v. *Irvmar Realty Corp.*, 7 A.D. 2d 436, 439, 184 NYS 2d 33.

Moreover, such rule of law is not restricted to New York. Therefore, over the country, it has been held that housewives who do not hold jobs and minors who are not employed are entitled to prove diminution of earning capacity.

18 ALR 3rd 146-148, 149-154.

Moreover, proof of his earnings before the accident which shows even greater earnings following the accident for some period would not deprive a permanently injured plaintiff of an element of damages for diminution of earning capacity.

> *Kaffana* v. *Pennsylvania R.R. Co.*, 217 F. Supp. 362 (D.C. Pa. 1963)

That plaintiff continued to work with pain, as the record below discloses Mr. Harel did, in no way disqualifies him from claiming the effect of the injury upon him physically and contemplating the effect of such condition upon his earning expectancy or capacity. A similar argument was rejected in *Faudree* v. *Iron City Sand & Gravel Co.*, 315 F. 2d 647 (C.A. 3, 1963), the Court noting at p. 650:

> "Plaintiff testified concerning the pain, suffering and inconvenience he experienced while still working for defendant after the occurrence of the accident, and said the only reason he could continue to work was because tranquilizers kept him going."

It is apparent that appellant's arguments concerning the absence of any proof of lost time from employment to the date of trial, as well as his dollar earnings at the time of trial are specious and insufficient to warrant review. In another case, the plaintiff WILES was earning more money at his job after the accident than he had been before. The Court there stated:

> "The evidence that Wiles is employed by the railroad at a larger salary than that which he was receiving when he was injured is a facet of the issue

of damages which the jury was entitled to take into consideration. . . . Because of his present employment, Wiles has not yet suffered economic loss, but if he cannot obtain gainful employment elsewhere, he is chained to his present job in a kind of economic servitude. . . . Certainly, Wiles' economic horizons had been limited by his injury. . . . The availability to Wiles of the labor market for heavy-duty workers was certainly a factor which the jury was entitled to take into consideration in fixing an amount for damages due to him for loss of future earning power. . . . All of the factors enumerated and others were before the jury and we cannot say that there was a significantly larger element of speculation in arriving at an estimate of Wiles' future earnings than there would be in any ordinary instance requiring an estimate of damages by a jury. Since none of us is capable of foreseeing the future with any substantial degree of certainty, every estimate of damages must contain elements of speculation."

Wiles v. *N.Y., Chicago & St. Louis RR Co.*, 283 F. 2d 328

Similar contentions to those made by the appellant herein were made in another case, but there rejected:

"Appellant objects to what the Court said in the charge with reference to plaintiff's loss of earning power. The defendant excepted to this on the ground that there was no evidence of the loss of earning power and no issue on this to be submitted to the jury. It now urges that there was no such evidence and the jury verdict as such is entirely conjectural.

"It seems to us that the Trial Court's language on this point was justified by the testimony. The evidence as to plaintiff's injuries is as above outlined. The medical testimony is that the plaintiff has sustained a definite permanent injury. . . . There was obviously an impairment of plaintiff's earning power due to this accident, and the Court, rightly, left it to the jury for the latter to say how much this amounted to."

Reeves v. *Philadelphia Import Co.*, 150 F. 2d 354 (CA 3, 1944)

The cases and reference in the appellant's Brief to lost earnings therefore are totally inappropriate. The Court below properly charged on the issue of impairment of earning capacity on the basis of the evidence in the record, the significant portions of which as to this issue have been set forth in the Statement of Facts herein (*supra*).

There having no error of law by the Court below in the charge, this Court cannot review the substantive issue of this Appeal, namely whether the damages were excessive.

Locke Insulator Corp. v. *Jacque*, 293 U.S. 585, 55 S.Ct. 99

Southern Pacific Co. v. *Maloney*, 136 F. 171 (CCA Neb. 1905)

In the *Southern Pacific* case, the Court stated at p. 173, "in the Federal Appellate Courts, where no error of law appears on the record, a verdict is conclusive in respect of the amount of damages."

It is respectfully submitted therefore that in the absence of any error of law in this record, this Court need not even

reach the question of excessiveness, dealt with in the following point.

POINT II

The amount awarded was well within the province of the jury and the Trial Court should be affirmed in its denial of the motion to set the verdict aside as excessive.

Perhaps the best one word description of the verdict awarded plaintiff-appellee would be "modest". If only $20,000.00 of the verdict were allocated to the initial period of suffering, hospitalization and total disability, all occurring to a young man in a strange country, that would leave a balance of $55,000.00. Since the testimony was that four fractured vertebrae present a permanent injury, and the present restrictions and pain are reasonably anticipated to increase by virtue of the normal effects of aging on these now abnormally weakened structures and the surrounding tissue, the division of the balance of the award over the remainder of his life comes to little more than $1,000.00 per year. In fact, there seems no room in this award for calculation of diminution of earning capacity. Solely from an equitable viewpoint, technicalities aside, the appeal from this verdict is both presumptuous and unwarranted. Appellant's counsel obviously is cognizant of the weakness of attacking the award on the basis of the evidence most favorable to plaintiff, since much of the brief is devoted to relitigating the factual basis of the verdict. Two pages are devoted to restating the testimony of the appellant's medical expert whose views obviously were rejected by the jury.

It is well settled, however, that an Appellate Court does not weigh the evidence, but only ascertains facts most

favorable to the plaintiff which the jury were justified in finding.

Pennsylvania Steel Co. v. *Jacobson,* 157 F. 656 (CCA NY, 1907)

It also has been stated, "the finding of the jury is conclusive on us."

Elias v. *Wright,* 276 F. 908 (CCA NY, 1921)

It further has been stated in *Napier* v. *Greenzweig,* 256 F. 196 (CCA NY, 1919), "Appellate Courts of the United States do not sit to weigh conflicting testimony . . . and where the evidence is conflicting, an Appellate Court does not interfere."

That the Appellate Court might itself have reached a different conclusion obviously is irrelevant.

O'Connor v. *Ludlam,* 92 F. 2d 50, cert. den. 58 S.Ct. 364, 302 U.S. 758

Even in the Courts of New York State, a jury verdict will not be set aside unless it is "shocking", "outrageous" or "monstrous."

Mondella v. *Erie Lackawanna R.R.,* 62 Misc. 2d 989, 310 NYS2d 237

See, also,

4 *Weinstein, Korn, Miller* §4404.10

The Federal cases indicate an even greater reluctance to revise verdicts on the basis of excessiveness.

Ramsdell v. *Goumis,* 228 F. 364 (CCA NY, 1915)
Mann v. *Dempster,* 181 F. 76 (CCA 2d, 1910)

Metropolitan Street Railway Co. v. *Beattie*, 111 F. 945 (CCA 2d, 1901)

In the *Mann* case, *supra*, the Court stated, at p. 81:

". . . it is well settled that the size of a verdict is not a subject of review in this Court."

Likewise, in the *Metropolitan Street Railway* case, the Court states, "The question whether the amount of damages was excessive is not one for the consideration of this Court."

"The rule in the Federal Courts is strongly stated that where the claimed excessiveness is not purely a matter of law, as where the maximum recovery permitted by statute has been exceeded, but is only one of judgment as to the amount proved by the evidence, the decision rests with the Trial Court, and only where there is an abuse of discretion is its action reviewable."

Dubrock v. *Interstate Motor Freight*, 143 F. 2d 304, cert. den. 65 S.Ct. 119, 323 U.S. 765

Last, but not least, the viewpoint of the Trial Judge, who was present during the trial and who expressed his views that the verdict was not excessive, has been accorded weight by the cases, as well it should be. The determination of the Trial Judge as to whether damages are excessive is one within his discretion and that discretion will not be reviewed in the absence of its abuse.

Southern Freight Distributors v. *Fulmer*, 107 F. 2d 456 (CCA Va., 1940)

The decision of this Court might well employ the language of the Court in *Faudree* v. *Iron City Sand & Gravel Co., supra,* in which that Court stated at p. 651,

> "... the question of excessiveness of a verdict is primarily a matter addressed to the sound discretion of the Trial Judge. It certainly cannot be said, on the basis of the record before us, that the Court below committed an abuse of discretion in refusing to grant defendant a new trial on the grounds of excessiveness."

CONCLUSION

WHEREFORE, it is respectfully submitted that this Appeal should be summarily dismissed.

Respectfully submitted,

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Service of Two (2) copies of the within Brief is admitted this 15 day of Feb 1977

Defendant Appellee

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